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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA

18 SAN FRANCISCO DIVISION

19 NATALIE OCEGUEDA, derivatively on
behalf of FACEBOOK, INC.,

20 Plaintiff,

21 v.

22 MARK ZUCKERBERG, SHERYL
SANDBERG, MARC ANDREESSEN,
ANDREW W. HOUSTON, ERSKINE B.
BOWLES, JEFFREY D. ZIENTS, SUSAN
DESMOND-HELLMANN, NANCY
KILLEFER, TRACEY T. TRAVIS,
ROBERT M. KIMMITT, REED HASTINGS,
PETER A. THIEL, and DOES 1-30,

23 Defendants,

24 -and-

25 FACEBOOK, INC.,

26 Nominal Defendant.

CASE NO. 3:20-cv-04444-LB

27 **DEFENDANTS' NOTICE OF MOTION AND
MOTION TO DISMISS PLAINTIFF'S
VERIFIED SHAREHOLDER DERIVATIVE
COMPLAINT, AND MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT**

Hearing: February 4, 2021

Time: 9:30 a.m.

Location: Courtroom B – 15th Floor

Judge: Hon. Laurel Beeler

28 Action filed July 2, 2020

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on February 4, 2021 at 9:30 a.m., or as soon thereafter as
 3 the matter may be heard, in the United States District Court for the Northern District of California,
 4 Courtroom B – 15th Floor, located at 450 Golden Gate Avenue, San Francisco, California 94102,
 5 Nominal Defendant Facebook, Inc. (“Facebook” or the “Company”), through its undersigned
 6 counsel, will, and hereby does, move to dismiss Plaintiff Natalie Ocegueda’s (“Plaintiff”) Verified
 7 Shareholder Derivative Complaint (the “Complaint” or “Compl.”) pursuant to Federal Rule of
 8 Civil Procedure (“FRCP”) 23.1 and the doctrine of *forum non conveniens*. The Complaint should
 9 be dismissed because (1) Plaintiff failed to make a pre-suit demand on Facebook’s Board of
 10 Directors (the “Board”) and does not adequately plead demand futility, and (2) the forum-selection
 11 clause in the Company’s Restated Certificate of Incorporation designates the Delaware Court of
 12 Chancery as the exclusive forum for Plaintiff’s claims.

13 Defendants Mark Zuckerberg, Sheryl Sandberg, Marc Andreessen, Andrew W. Houston,
 14 Erskine B. Bowles, Jeffrey D. Zients, Susan Desmond-Hellmann, Nancy Killefer, Tracey T.
 15 Travis, Robert M. Kimmitt, Reed Hastings, and Peter A. Thiel (the “Individual Defendants” and,
 16 together with Facebook, “Defendants”), through their undersigned counsel, will, and hereby do,
 17 further move to dismiss the Complaint pursuant to FRCP 12(b)(6) for failure to state a claim for
 18 violation of Section 14(a) of the Securities Exchange Act of 1934 (the “Exchange Act”). The
 19 Complaint fails to allege particularized facts demonstrating that Facebook’s annual proxy
 20 statements contained any false or misleading statement, nor that the Individual Defendants knew
 21 or were negligent in not knowing of the existence of a false or misleading statement, nor that the
 22 proxy statements were an “essential link” to any resulting corporate harm.

23 Finally, all Defendants move to dismiss the Complaint pursuant to FRCP 12(b)(1) because
 24 all of Plaintiff’s claims are based on speculative damages and therefore unripe.

25 Defendants’ joint motion to dismiss (the “Motion”) is based on this Notice, the supporting
 26 Memorandum of Points and Authorities (“Memorandum”), the Declaration of Stephen P. Barry
 27 filed concurrently herewith,¹ the accompanying Request for Judicial Notice, the complete files and

28 ¹ All references to “Ex.” herein are to the exhibits to the Declaration of Stephen P. Barry.

records in this action, and any additional material and arguments as may be considered in connection with the hearing on the Motion.²

3 Through this Motion, Defendants respectfully request that the Court (i) dismiss the action
4 pursuant to FRCP 23.1 for failure to make a demand on the Board or adequately plead demand
5 futility; (ii) dismiss the action on *forum non conveniens* grounds; (iii) dismiss Plaintiff's federal
6 derivative claim under the Exchange Act for failure to state a claim pursuant to FRCP 12(b)(6);
7 and/or (iv) dismiss the action pursuant to FRCP 12(b)(1) because it is based on speculative
8 damages that have not yet occurred and is therefore unripe.

ISSUES TO BE DECIDED

10 1. Whether the Court should dismiss Plaintiff's Complaint for failure to make a pre-
11 suit demand on the Board or to plead with particularity that such a demand would have been futile,
12 as required by FRCP 23.1 and Delaware law.

13 2. Whether the Court should dismiss Plaintiff's Complaint on *forum non conveniens*
14 grounds because Facebook's Restated Certificate of Incorporation designates the Court of
15 Chancery of the State of Delaware as the sole and exclusive forum for any derivative action
16 brought on the Company's behalf and any action asserting a claim of breach of fiduciary duty
17 owed by a director or officer of the Company.

18 3. Whether the Court should dismiss Plaintiff's Section 14(a) claim for failure to state
19 a claim upon which relief can be granted and because the claim is time-barred.

20 4. Whether the Court should dismiss Plaintiff's Complaint because it seeks
21 speculative damages that have not yet occurred and is therefore unripe.

22 | I. INTRODUCTION

23 This is Plaintiff Natalie Ocegueda's second shareholder derivative action brought against
24 Facebook's officers and directors in this Court in the last three years, and it is one of multiple—

26 ² By agreement of the Parties and in the interest of judicial efficiency, see Dkt. No. 41, Defendants
27 are deferring and hereby reserve all additional arguments and requests for relief as to Plaintiff's
28 failure to state a claim under state law for breach of fiduciary duty, aiding and abetting breach of
fiduciary duty, abuse of control, and unjust enrichment, and specifically reserve their right to seek
dismissal of those claims pursuant to FRCP 12(b)(6) should the claims remain extant following
resolution of the instant Motion.

1 six and counting—that her counsel has filed in rapid succession over the past several months
 2 against a number of companies in the wake of the national conversation on race. All six of those
 3 recent cases were filed without making a demand on the companies’ boards of directors (let alone
 4 a “books and records” request under Delaware law). Each suit rests on the same theory—that the
 5 companies lack sufficiently diverse boards or workforces, which supposedly (1) reflects violations
 6 of the defendant directors’ fiduciary duties to the corporations and their shareholders and (2)
 7 renders false or misleading public statements about the companies’ commitments to diversity and
 8 inclusion. That failure to make any apparent pre-litigation investigation of the facts or make any
 9 demand on the Board, and instead to pursue a cookie-cutter approach to litigation helps explain
 10 why Plaintiff gets basic facts wrong about Facebook, the Company’s commitment to diversity and
 11 inclusion, and the diversity of its executive management and Board.

12 For instance, the Complaint repeatedly alleges that Facebook’s Board has only “one Black
 13 member,” and that the Company’s executive management is “all white, with no minorities
 14 whatsoever.” Compl. ¶¶ 9, 11, 102, 104. Both of those claims are demonstrably false. Facebook’s
 15 nine-person Board has two Black members—and did throughout most of the time period at issue—
 16 and therefore has included a higher percentage of Black members than the general U.S. population
 17 during the same timeframe. (Plaintiff puzzlingly names one current Black director as a Defendant,
 18 but she expressly refrains from naming Facebook’s other current Black director or a third former
 19 Black director whose tenure ended in early 2020.) And several of Facebook’s senior executives
 20 are non-white, including the Company’s Head of Infrastructure Engineering, Head of New Product
 21 Experimentation, Head of Workplace, Chief Diversity Officer, and former Chief Marketing
 22 Officer. On top of that, Plaintiff simply ignores the diversity of Facebook’s leadership in multiple
 23 other respects. *Four* out of nine Board members and two out of the five officers that Plaintiff
 24 identifies in the Complaint are female. Peter Thiel, a longstanding member of Facebook’s Board,
 25 is openly gay. And the Company recently announced an openly gay replacement for its Chief
 26 Marketing Officer. In short, the composition of both the Board and Facebook’s executive
 27 management reflects the Company’s commitment to diversity of race, as well as ethnicity, sexual
 28 orientation, and gender—among other things.

1 As is clear from publicly available information (highlighted in detail below), Facebook
 2 takes seriously its role as a corporate citizen in this country's dialogue about race. Facebook has
 3 been a corporate leader on workplace and Board diversity, and is actively engaged in ongoing
 4 efforts to continue improving on that record. In contrast, this lawsuit—which is wrong on the facts
 5 and has no basis in the law—is not serious but rather a crass attempt to take advantage of that
 6 movement. Plaintiff's Complaint must be dismissed for at least three independent reasons.

7 ***First***, the Complaint should be dismissed under FRCP 23.1 because Plaintiff fails to satisfy
 8 her threshold burden of demonstrating that she is entitled to sue derivatively on the Company's
 9 behalf. Judge Gilliam promptly dismissed her prior derivative action in this Court because she
 10 had no excuse for failing to make a pre-suit demand on Facebook's Board. *See In re Facebook,*
 11 *Inc. S'holder Data Privacy Litig.*, 367 F. Supp. 3d 1108 (N.D. Cal. 2019) (Gilliam, J.). The same
 12 defect persists here: Plaintiff admits she did not make a pre-suit demand on the Board and, as with
 13 her first suit, she fails to plead with particularity why such a demand would have been futile. *Id.*
 14 at 1124-25. The Complaint rests on vague theories of liability that the Board's purported failure
 15 to address "red flags" related to the Company's hiring, Board nomination, and advertising practices
 16 resulted in a boycott by a small number of advertisers beginning in June 2020, as well as allegedly
 17 false proxy statements about Facebook's commitment to diversity. Plaintiff does not allege a
 18 single fact suggesting that any member of the current Board at any time acted in dereliction of
 19 their duties or disregarded any discriminatory practices, such that they could not have properly
 20 exercised their independent and disinterested business judgment in responding to a demand for
 21 action. Judge Gilliam's decision refusing to allow Plaintiff to wrest control of Facebook's
 22 litigation decisions thus applies equally here. *See id.* at 1128.

23 ***Second***, Plaintiff's lawsuit should be dismissed because she filed it in the wrong forum.
 24 As Judge Gilliam recognized, Facebook's Restated Certificate of Incorporation contains a binding
 25 forum-selection clause mandating that "any derivative action . . . brought on behalf of the
 26 corporation" or "any action asserting a claim of breach of a fiduciary duty owed by . . . any
 27 director" of the Company "shall" be filed in the Delaware Court of Chancery. *Id.* at 1119. That
 28 provision is valid and enforceable, and the entirety of this derivative action—including both

1 Plaintiff's state-law and her federal-law claims—falls squarely within its scope. This Court should
 2 reject Plaintiff's second attempt to circumvent this provision and dismiss her complaint on *forum*
 3 *non conveniens* grounds.

4 ***Third***, while the Court need not reach the merits of the Complaint in light of these threshold
 5 issues,³ Plaintiff's federal-law claim fails on the merits. That derivative claim under Section 14(a)
 6 of the Exchange Act fails to meet even the most basic pleading requirements, let alone the
 7 heightened demands of Rule 9(b) and the Private Securities Litigation Reform Act of 1995
 8 ("PSLRA")—and it comes too late to the extent it challenges statements made over a year ago.
 9 Plaintiff accuses Individual Defendants of knowingly causing Facebook to make material
 10 misrepresentations in its 2019 and 2020 proxy statements about the Company's commitment to
 11 diversity. But even setting aside the logical flaw of Plaintiff's theory that the current Board harmed
 12 the Company by causing Facebook unwittingly to issue misleading proxies (before several current
 13 members even joined the Board), the Complaint does not and cannot specify any facts showing
 14 any statements were false or misleading. *See Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022-23
 15 (9th Cir. 2000) (dismissing Section 14(a) claims that failed to meet both PSLRA and Rule 9(b)
 16 pleading requirements). Nor does Plaintiff plead, as she must, that any alleged misstatement was
 17 an "essential link" to the advertiser boycott that purportedly harmed Facebook.

18 ***Finally***, the Complaint should be dismissed because Plaintiff's claims are unripe insofar
 19 as they are premised on speculative damages that have not yet occurred. Plaintiff asserts that, as
 20 a result of Individual Defendants' alleged actions, Facebook "will continue to expend significant
 21 additional money" defending against lawsuits (like this one, ironically) and paying undeserved
 22 compensation to its directors and officers, and may lose "advertising revenue." Compl. ¶ 183. But
 23 no relief can be granted for claims that "rest[] upon contingent future events that may not occur as
 24 anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

25 For all of these reasons, the Complaint should be dismissed in its entirety.

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³ The Parties agreed to defer arguments on the merits of Plaintiffs' state-law claims. Dkt. No. 41.

1 **II. BACKGROUND**

2 ***Facebook's Business.*** Facebook is a Delaware corporation headquartered in Menlo Park,
 3 California. Compl. ¶ 37. The Company “enables people to connect, share, discover, and
 4 communicate with each other on mobile devices and personal computers.” Ex. A at 7. Facebook
 5 users generally can decide what information to share or restrict based on their own criteria, subject
 6 to certain limits. Compl. ¶ 37. For example, Facebook publishes “Community Standards” that
 7 “apply to ads and include policies that, for example, ban hate speech, harmful content, and content
 8 designed to intimidate voters or stop them from exercising their right to vote.” Ex. B at 72. And
 9 Facebook’s Terms of Service prohibit users from doing or sharing anything “unlawful, misleading,
 10 discriminatory or fraudulent.” Ex. I. The Company’s mission is “to give people the power to build
 11 community and bring the world closer together.” Ex. B at 72; Ex. A at 7.

12 Facebook has consistently maintained a board of directors comprising highly regarded
 13 professionals from varying backgrounds. Compl. ¶¶ 38-49. Two current members of Facebook’s
 14 nine-member Board—Tracey Travis and Peggy Alford—are Black, and four—Ms. Travis, Ms.
 15 Alford, Sheryl Sandberg, and Nancy Killefer—are women. Ex. B at 3. A former Black director,
 16 Kenneth Chenault, stepped down in March 2020 to join Berkshire Hathaway. Compl. ¶ 1.

17 Since 2012, Facebook’s Restated Certificate of Incorporation has included a forum-
 18 selection clause requiring that any derivative claims be brought in the Delaware Court of Chancery.
 19 Ex. F, Art. IX. The same governing document also exculpates directors from personal liability for
 20 breaches of fiduciary duty to the fullest extent permitted by law. *Id.* Art. VII, ¶ 1

21 ***Facebook’s 2019 Proxy Statement.*** Each year, Facebook issues a proxy statement
 22 notifying stockholders of items subject to vote at the Company’s annual meeting. *Id.* ¶ 96.
 23 Facebook publicly filed its 2019 proxy statement with the United States Securities and Exchange
 24 Commission (“SEC”) on April 12, 2019 (the “2019 Proxy”). *Id.*; Ex. C. The 2019 Proxy contained
 25 recommendations from Facebook’s then-current directors—Defendants Zuckerberg, Sandberg,
 26 Andreessen, Bowles, Desmond-Hellmann, Hastings, Thiel, and Zients, as well as non-defendant
 27 Chenault—concerning the election of candidates to the Board; the appointment of Ernst & Young
 28 LLP as Facebook’s independent auditor; and stockholder proposals related to, among other things,

1 appointing an independent Board chairman, enacting a Board diversity policy, and workforce
 2 diversity. Ex. C at 3-4. The 2019 Proxy also contained general statements about the Company's
 3 governance, transparency, and commitments to diversity, sustainability, and social good. *Id.*

4 ***Facebook's 2020 Proxy Statement.*** Facebook publicly filed its 2020 proxy statement on
 5 April 10, 2020 (the "2020 Proxy" and, together with the 2019 Proxy, the "Proxies"). Compl. ¶ 97;
 6 Ex. B. Like the 2019 Proxy, the 2020 Proxy contained various recommendations from the then-
 7 current Board—including Defendants Zuckerberg, Sandberg, Andreessen, Houston (who had just
 8 joined the Board in February 2020), Kimmitt (who joined in March 2020), Killefer (who joined in
 9 March 2020), Travis (who also joined in March 2020), Thiel, and Zients, as well as non-defendants
 10 Alford and Chenault (whose term as a director would conclude at the annual meeting). Compl. ¶
 11 97; Ex. B at 10-11. The 2020 Proxy also reiterated Facebook's business values.

12 ***Facebook's Commitment to Diversity.*** Facebook has long been committed to "building a
 13 workforce that is as diverse as the communities [it] serve[s]." *Id.* ¶¶ 52, 103. Every year since
 14 2014, the Company has voluntarily published its global gender diversity and U.S. ethnic diversity
 15 workforce data. *Id.* ¶ 52. In 2015, Facebook implemented a "Diverse Slate Approach" that
 16 requires hiring managers to consider candidates from underrepresented backgrounds when
 17 interviewing for open positions. *Id.* Facebook regularly invests in workforce community groups
 18 and events to "empower, inspire, and provide resources to help [its] people grow professionally." *Id.*
 19 And over the years, the Company has developed numerous internal training programs designed
 20 to foster diversity—covering topics such as "Managing Unconscious Bias," "Be the Ally," and
 21 "Managing Inclusion." *Id.* Those initiatives have yielded progress. Facebook increased the
 22 number of female employees globally from 31% in 2014 to 37% in 2019, and increased "the
 23 number of Black women at Facebook by a factor of 25 and the number of Black men by a factor
 24 of 10" during the same span. Ex. B at 52, 81; Compl. ¶ 131; Ex. C at 47 (noting "steady increases
 25 in hiring rates for underrepresented people since" starting the "Diverse Slate Approach").

26 Facebook is also committed to diversity and inclusion at the Board level. Under its
 27 corporate governance guidelines, the Board considers individuals from diverse backgrounds and
 28 ensures that the initial list of candidates from which new director nominees are chosen reflects a

1 diversity of race, ethnicity, and gender. Compl. ¶ 52; Ex. B at 53. Since the Board adopted this
 2 diversity policy in 2018, a *majority* of new nominees have been Black or women. In addition, in
 3 2019, two of eight total nominees were Black. Ex. C at 50 (nominating Ms. Alford and Mr.
 4 Chenault). Likewise, in 2020, two of nine total nominees were Black. Ex. B at 56 (Ms. Alford
 5 and Ms. Travis). And in 2019 and 2020 combined, seven of twelve total nominees were women.

6 ***Housing, Employment, and Credit-Related Advertising Changes.*** In August 2018, the
 7 United States Department of Housing and Urban Development (“HUD”) issued a public charge
 8 alleging that Facebook users were able to publish housing advertisements on the platform that
 9 discriminated based on race, ethnicity, and gender, and other characteristics. Compl. ¶¶ 65-66. In
 10 September 2018, the American Civil Liberties Union (“ACLU”) filed a lawsuit alleging that
 11 advertisers were discriminating based on gender in “help wanted” advertisements on Facebook.
 12 *Id.* ¶ 67. In March 2019, in an effort to prevent advertisers from using any discriminatory tactics,
 13 the Company removed age, gender, and ZIP code targeting for all advertisements offering housing,
 14 employment, and/or credit opportunities. *Id.* ¶ 76.

15 ***Facebook Advertiser Boycott.*** In May 2020, Facebook faced criticism for not censoring a
 16 post from President Trump related to Black Lives Matter protesters. *Id.* ¶ 79. Certain businesses
 17 announced plans to stop advertising on Facebook because they considered the President’s remarks
 18 “hate speech.” *Id.* ¶¶ 80-84. Mr. Zuckerberg explained the Company’s decision not to remove the
 19 post: “I disagree strongly with how the President spoke about this, but I believe people should be
 20 able to see this for themselves, because ultimately accountability for those in positions of power
 21 can only happen when their speech is scrutinized out in the open.” Ex. D; *see also* Compl. ¶ 79.
 22 Notwithstanding some companies’ decisions to temporarily discontinue advertising on Facebook,
 23 the Company reported successful financial results for the fiscal quarter even in the face of the
 24 global COVID-19 pandemic and a corresponding economic slowdown—including an 11% year-
 25 over-year advertising revenue increase. Ex. E at 27. And although Plaintiff alleges that
 26 Facebook’s stock price declined 8.3% immediately after the boycott announcement on June 26,
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1 2020, Compl. ¶ 20, the value of the Company’s shares fully recovered just three days later, and
 2 increased over 49% during the relevant quarter.⁴

3 ***Plaintiff’s Lawsuits.*** Plaintiff did not make a demand on the Board and filed this
 4 shareholder derivative action on July 2, 2020, purporting to assert claims on Facebook’s behalf
 5 against Individual Defendants for breach of fiduciary duty, aiding and abetting breach of fiduciary
 6 duty, abuse of control (against Mr. Zuckerberg only), unjust enrichment, and violation of Section
 7 14(a) of the Exchange Act. Compl. ¶¶ 222-47. Plaintiff alleges that, as a result of Individual
 8 Defendants’ purported wrongdoing, Facebook suffered damages including (1) reputational harm
 9 “evidenced by” the June 2020 “boycott,” *id.* ¶ 181; (2) investors being “less likely to invest” in the
 10 Company, *id.* ¶ 182; and (3) the expenditure of “significant additional money” for lost advertising
 11 revenue, compensation paid to Defendants “responsible for the scheme,” and—remarkably—costs
 12 to defend against lawsuits *like the one Plaintiff herself filed, id.* ¶ 183. Plaintiff names as Individual
 13 Defendants eight current Board members, including Tracey Travis but not Peggy Alford—both of
 14 whom are Black. *Id.* ¶¶ 38-41, 45-47, 49. She also names four former Board members, not
 15 including Kenneth Chenault, who is Black and served on Facebook’s Board until 2020. *Id.* ¶¶ 42-
 16 44, 48, 91. All but two Individual Defendants are independent directors in that they are not also
 17 Facebook employees. *Id.*

18 **III. ARGUMENT**

19 **A. Plaintiff Did Not Make A Pre-Suit Demand And Fails To Allege Futility**

20 It is a “basic principle of corporate governance” that a corporation’s decisions—“including
 21 the decision to initiate litigation—should be made by the board of directors.” *In re Facebook*, 367
 22 F. Supp. 3d at 1123 (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 101 (1991)).
 23 Because derivative actions “effectively wrest[] control from the board of directors,” FRCP 23.1
 24 dictates that “a shareholder seeking to vindicate the interests of a corporation through a derivative
 25 suit must first demand action from the corporation’s directors or plead with particularity the
 26 reasons why such demand would have been futile.” *Id.; Tindall v. First Solar Inc.*, 892 F.3d 1043,
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28 ⁴ During the second quarter of the 2020 fiscal year, Facebook’s stock price increased from \$159.60
 on April 1, 2020 to \$237.55 on July 1, 2020. See <https://finance.yahoo.com/quote/FB>.

1 1046 (9th Cir. 2018). These pleading requirements are “stringent,” *Quinn v. Anvil Corp.*, 620 F.3d
 2 1005, 1012 (9th Cir. 2010), and Delaware courts have admonished plaintiffs who resort to
 3 derivative actions alleging demand futility without first seeking the corporation’s books and
 4 records to investigate any claims, *Beam v. Stewart*, 833 A.2d 961, 982-83 (Del. Ch. 2003).

5 Although Rule 23.1 controls “the adequacy of a plaintiff’s pleadings, the substantive law
 6 which determines whether demand is, in fact, futile is provided by the state of incorporation of the
 7 entity on whose behalf the plaintiff is seeking relief”—here, Delaware. *City of Birmingham Relief*
 8 & Ret. Sys. v. Hastings, 2019 WL 3815722, at *4 (N.D. Cal. Feb. 13, 2019). Delaware law is
 9 “clear that the bar is high, the standards are stringent, and the situations where demand will be
 10 excused are rare.” *Canty v. Day*, 13 F. Supp. 3d 333, 345 (S.D.N.Y. 2014). Corporate directors
 11 “are entitled to a *presumption* that they were faithful to their fiduciary duties,’ and ‘the burden is
 12 upon the plaintiff . . . to overcome that presumption.’” *In re Impax Labs., Inc. S’holder Deriv.*
 13 *Litig.*, 2015 WL 5168777, at *4 (N.D. Cal. Sept. 3, 2015) (quoting *Beam v. Stewart*, 845 A.2d
 14 1040, 1048-49 (Del. 2004)). To overcome that presumption, Plaintiff must “allege particularized
 15 facts that ‘create a reasonable doubt that . . . the board of directors could have properly exercised
 16 its independent and disinterested business judgment in responding to a demand.’” *In re Citigroup*
 17 *Inc. S’holder Deriv. Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009) (quoting *Rales v. Blasband*, 634
 18 A.2d 927, 934 (Del. 1993)). The inquiry focuses on the capability of the *existing* Board—“as of
 19 the time the complaint is filed”—to consider a pre-suit demand, *Rales*, 634 A.2d at 934, and
 20 Plaintiff must allege facts specific to *each* director, *In re Paypal Holdings, Inc. S’holder Deriv.*
 21 *Litig.*, 2018 WL 466527, at *5 (N.D. Cal. Jan. 18, 2018). “[C]onclusory allegations are not
 22 considered.” *Rosenbloom v. Pyott*, 765 F.3d 1137, 1148 (9th Cir. 2014) (quoting *Brehm v. Eisner*,
 23 746 A.2d 244, 255 (Del. 2000)). And “inferences that are not objectively reasonable cannot be
 24 drawn in the plaintiff’s favor.” *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008).

25 Plaintiff admits she did not make a demand on the Facebook Board before filing this
 26 lawsuit. For largely the same reasons that Judge Gilliam just last year dismissed *this very*
 27 *Plaintiff’s* claims against Facebook for failure to make a pre-suit demand, Plaintiff’s demand
 28 futility allegations do not come close to satisfying the stringent standards of Rule 23.1 and

1 Delaware law. *See In re Facebook*, 367 F. Supp. 3d at 1123-24 & n.5. She fails to allege any
 2 particular facts showing that a majority of nine Facebook directors serving at the time she filed
 3 suit—the “Demand Board”⁵—are personally “interested” in and therefore incapable of objectively
 4 considering a demand because they “face a substantial likelihood of liability for the claims alleged
 5 against them.” Compl. ¶ 192; *see also id.* ¶¶ 193-203. Nor does she allege any particular facts
 6 showing that the Board as a whole is “dominated and controlled by” Mr. Zuckerberg and therefore
 7 unable to act independently. *Id.* ¶ 204; *see also id.* ¶¶ 205-21. Finally, she fails to allege any facts
 8 suggesting that any Board “actions” were not valid exercises of business judgment. *Id.* ¶¶ 188-91.

9 1. **Plaintiff Fails To Establish That A Majority Of The Demand Board**
 10 **Faces A Substantial Likelihood Of Personal Liability**

11 Directors are deemed “interested” only “when the potential for liability is not a mere threat
 12 but instead may rise to a substantial likelihood.” *Ryan v. Gifford*, 918 A.2d 341, 355 (Del. Ch.
 13 2007); *see also Guttman v. Huang*, 823 A.2d 492, 502-03 (Del. Ch. 2003); *In re Silicon Graphics*
 14 *Inc. Sec. Litig.*, 183 F.3d 970, 990 (9th Cir. 1999), superseded by statute on other grounds as stated
 15 *in Burbrink v. Campbell*, 734 F. App’x 416 (9th Cir. 2018) (requiring plaintiff to plead “particular
 16 facts showing that the directors’ actions were so egregious that they faced a significant threat of
 17 liability”). That strict standard is not met for any director here, much less five of the nine directors
 18 comprising the Demand Board as of July 2, 2020, as required to establish demand futility.

19 a. Threshold Pleading Deficiencies Foreclose Plaintiff’s Substantial-
 20 Likelihood-Of-Personal-Liability Theory

21 Plaintiff alleges that Individual Defendants face a substantial likelihood of personal
 22 liability for breach of fiduciary duties based on a purported failure of oversight relating to
 23 Facebook’s commitment to diversity and its 2019 and 2020 Proxies. Compl. ¶¶ 193-203. That
 24 theory fails at the outset because Plaintiff fails to plead particularized facts sufficient to satisfy any
 25 of the three threshold conditions necessary to establish a substantial likelihood of liability—

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⁵ The Demand Board consists of Individual Defendants Andreessen, Houston, Killefer, Kimmitt,
 Sandberg, Thiel, Travis, and Zuckerberg, as well as non-defendant Peggy Alford.

1 (1) actual knowledge of illegal conduct, (2) on a director-by-director basis, (3) for the proper group
 2 of directors, *i.e.*, the Demand Board.

3 ***First***, the standard for showing a substantial likelihood of liability is higher than usual here
 4 because of the exculpatory provision in Facebook’s governing documents. Pursuant to Section
 5 102(b)(7) of the Delaware General Corporation Law, Article VII of Facebook’s Restated
 6 Certificate of Incorporation exculpates directors from personal liability for breaches of fiduciary
 7 duty to the fullest extent permitted by law. Ex. F, at Art. VII, ¶ 1. Because “directors are
 8 contractually or otherwise exculpated from liability for certain conduct, then a serious threat of
 9 liability may only be found to exist if [Plaintiff] pleads a non-exculpated claim against the directors
 10 based on particularized facts.” *In re Facebook*, 367 F. Supp. 3d at 1124 (citing *Wood*, 953 A.2d
 11 at 141). Specifically, as Judge Gilliam held in applying this exact provision against Plaintiff:

12 Because Article VII . . . includes an exculpatory provision that shields Facebook’s
 13 directors from liability for breaches of fiduciary duty to the fullest extent permitted
 14 by the Delaware General Corporation Law . . . Plaintiff[] must plead particularized
 facts that demonstrate that the directors acted with scienter, *i.e.*, that they had actual
 or constructive knowledge that their conduct was legally improper.

15 *Id.*; see also *In re Paypal*, 2018 WL 466527, at *3 (quoting *Wood*, 953 A.2d at 141). “Negligent
 16 or even reckless conduct is insufficient,” *id.*, and directors could be liable “[o]nly if they knowingly
 17 and completely failed to undertake their responsibilities” to the Company and its shareholders,
 18 *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 243-44 (Del. 2009). As with her first suit, the
 19 Complaint contains no particularized allegations that any director acted with scienter, and her suit
 20 must be dismissed on this ground alone.

21 ***Second***, Plaintiff relies almost entirely on broad allegations leveled against the Board as a
 22 whole, despite the black-letter requirement that she “plead facts *specific to each director*,
 23 demonstrating that at least half of them could not have exercised disinterested business judgment
 24 in responding to a demand.” *Towers v. Iger*, 912 F.3d 523, 529 (9th Cir. 2018) (quoting *Desimone*
 25 *v. Barrows*, 924 A.2d 908, 943 (Del. Ch. 2007)). This pleading failure, too, is fatal.

26 ***Third***, Plaintiff’s attempt to excuse demand is even weaker here than in her prior suit
 27 because of a mismatch between the Demand Board and the timing of the alleged misconduct. Four
 28 of the nine Demand Board directors—Mr. Houston, Ms. Killefer, Mr. Kimmitt, and Ms. Travis—

joined less than two months before the 2020 Proxy was issued, and a fifth, Ms. Alford, who is not named as a Defendant, joined in May 2019, after publication of the 2019 Proxy. Ex. G (noting start dates of Facebook directors). Those individuals necessarily cannot be culpable for misconduct by the Board outside their tenure—and Plaintiff explicitly concedes as much. Compl. ¶¶ 41, 45-47 (noting that Houston, Killefer, Travis, and Kimmitt are “not sued herein for any conduct that pre-dated [his or her] joining of the Board”). The most Plaintiff could muster is that some of these new directors “reviewed and approved” the 2020 Proxy a few weeks after assuming their positions. But virtually all of the events Plaintiff relies on to suggest knowledge of allegedly improper policies and practices pre-date those individuals’ appointment to the Board. *See City of Cambridge Ret. Sys. v. Ersek*, 921 F.3d 912, 922-23 (10th Cir. 2019) (rejecting demand futility allegations where six of twelve current board members joined *after* challenged events occurred). These include allegations concerning prior litigation and congressional testimony in 2018 and 2019 related to platform settings that “allowed advertisers” to restrict advertisements using certain geographic and other parameters, Compl. ¶¶ 57-61, 65-67, 76, 78; personnel changes in 2018, *id.* ¶¶ 23-24; a 2019 Ernst & Young “audit” assessing “how Facebook measures and reports data about video advertisements,” *id.* ¶ 77; and public news articles on a variety of topics from 2018 and 2019, *id.* ¶¶ 64, 68-71. As such, Plaintiff necessarily cannot plead conscious and bad-faith misconduct *on a director-by-director basis* for *at least* half of the Demand Board.

b. Plaintiff Fails To Allege Substantial Liability On Her Oversight Failure Claim

Plaintiff's substantial-likelihood-of-personal-liability theory rests on a claim that Individual Defendants failed to fulfill their fiduciary duty of oversight. Such a so-called "Caremark claim" is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 55 (Del. 2017). Directors cannot be held liable on a Caremark claim unless one of two prongs is satisfied: "(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems

1 requiring their attention.” *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006). Plaintiff also must
 2 demonstrate that the directors’ failure of oversight “resulted in damage to the corporation” by
 3 causing a “corporate trauma.” *Okla. Firefighters Pension & Ret. Sys. v. Corbat*, 2017 WL
 4 6452240, at *20 (Del. Ch. Dec. 18, 2017) (“corporate trauma . . . must be sufficiently similar to
 5 the misconduct implied by the ‘red flags’ such that the board’s bad faith, ‘conscious inaction’
 6 proximately caused the trauma”) (citation omitted). Plaintiff fails to make any of these showings.

7 Plaintiff does not satisfy the first *Caremark* prong because she admits that Facebook had
 8 relevant internal policies relating to diversity and inclusion, as well as financial controls, in place
 9 throughout the relevant period. For example, Plaintiff admits that Facebook has programs and
 10 policies to further diversity and inclusion in its workforce and Board. *See, e.g.*, Compl. ¶ 52
 11 (describing “Diverse Slate Approach, which sets the expectation that hiring managers will consider
 12 candidates from underrepresented backgrounds when interviewing for an open position,” as well
 13 as “thriving Facebook Resource Groups and [its] Community events such as Women’s Community
 14 Summit, Black Community Summit, Latin Community Summit, and Pride Community Summit,”
 15 “Managing Unconscious Bias” training, and “Managing Inclusion” and “Be The Ally” programs);
 16 *see also id.* (noting that “it is the policy of our board of directors to consider candidates with diverse
 17 backgrounds . . . and to ensure that the initial list of candidates from which new director nominees
 18 are chosen includes candidates with a diversity of race, ethnicity, and gender”). Plaintiff also
 19 acknowledges that the “principal purpose” of Facebook’s Audit & Risk & Oversight Committee
 20 is to assist the Board in overseeing a “system of internal controls” and “audit processes.” *Id.* ¶
 21 159. Those are precisely the kind of facts courts have pointed to in rejecting *Caremark* claims.
 22 *See, e.g.*, *In re Polycom, Inc.*, 78 F. Supp. 3d 1006, 1015 (N.D. Cal. 2015) (rejecting *Caremark*
 23 allegations of “inadequate” oversight where complaint conceded “existence of [the] Audit
 24 Committee, the Committee’s duties, and . . . Code of Business Ethics and Conduct”).

25 Plaintiff fares no better with the second *Caremark* prong, which requires that she allege
 26 facts showing Individual Defendants “had knowledge of certain ‘red flags’ indicating corporate
 27 misconduct and acted in bad faith by consciously disregarding [their] duty to address that
 28 misconduct.” *Melbourne Mun. Firefighters’ Pension Trust Fund v. Jacobs*, 2016 WL 4076369, at

*8 (Del. Ch. Aug. 1, 2016). Plaintiff points to a wide range of historical events as purported “red flags”—including congressional testimony by Mr. Zuckerberg, e.g., Compl. ¶¶ 57-62, 78, various public news articles, *id.* ¶¶ 64, 68-69, 73-77, an audit of Facebook’s reporting related to video advertisements, *id.* ¶ 77, and lawsuits related to purportedly discriminatory ads, *id.* ¶¶ 67, 76. She alleges the Board acted in bad faith by disregarding these purported red flags, allowing executives to be paid based on discriminatory policies and conduct, and allowing Facebook to publish purportedly misleading Proxies. *Id.* ¶¶ 190, 196-97.

Plaintiff’s conclusory allegations do not show any substantial likelihood of *Caremark* liability: none of the purported “red flags” demonstrates the inadequacy of, or the Company’s failure to comply with, its stated diversity and anti-discrimination policies. *Id.* ¶¶ 121, 181. Plaintiff does not identify bad faith conduct by any director in connection with the purported “red flags,” which she also fails to connect to any “massive damage to Facebook” purportedly occurring with the June 2020 advertiser boycott, *id.* ¶¶ 17-21, 181, 202. *See Desimone*, 924 A.2d at 940 (“Delaware courts routinely reject the conclusory allegation that . . . internal controls must have been deficient, and the board must have known so.”). Indeed, Facebook’s strong financial performance in the wake of the boycott announcement makes Plaintiff’s assertion of *any* corporate trauma implausible on its face. *See supra* Section II.

First, Plaintiff has not alleged how Mr. Zuckerberg’s congressional testimony about Facebook’s purported “history” of “allowing” advertisers to post discriminatory housing ads and about its proposed cryptocurrency and related network were “red flags” alerting Facebook’s Board about anything. *See In re Facebook*, 367 F. Supp. 3d at 1125. To sustain her pleading burden, Plaintiff must allege “particularized facts about what [Individual Defendants] knew, when [they] knew it” and “what [they were] actually told” about the alleged red flags. *Horman v. Abney*, 2017 WL 242571, at *12 (Del. Ch. Jan. 19, 2017). But apart from citing a handful of cherry-picked news reports concerning small portions of that testimony, Plaintiff has not alleged facts establishing what any Individual Defendant actually knew as a result of Mr. Zuckerberg’s statements—let alone explained how any Individual Defendant was put on notice of the purported harm (stemming from the advertiser “boycott”) that allegedly materialized much later. *See In re*

1 *Sunbeam Sec. Litig.*, 89 F. Supp. 2d 1326, 1346 (S.D. Fla. 1999) (“conclusory, fact-deficient
2 allegation” of “red-flags” insufficient).

3 **Second**, Plaintiff similarly fails to explain how news articles discussing a former
4 employee’s opinions about supposed shortcomings in Facebook’s diversity efforts were “red flags”
5 of *illegal action or corporate wrongdoing*. *See In re Facebook*, 367 F. Supp. 3d at 1125 (“As to
6 what constitutes a red flag, evidence of illegality is the ‘proverbial red flag.’”). Beyond citing a
7 single Facebook spokesperson, Compl. ¶ 71, nothing in the Complaint suggests any Individual
8 Defendant even knew about the articles or complaints on which Plaintiff relies, *see In re Facebook*,
9 367 F. Supp. 3d at 1126 (“As to the complaints raised by former Facebook employees . . .
10 Plaintiff[] fail[s] to plead particularized facts showing that a majority of the Board was even aware
11 of these complaints.”). In any event, alleged concerns raised by one former employee two years
12 ago do not constitute “pervasive, glaring ‘red flags.’” *SEC v. Yorkville Advisors, LLC*, 305 F.
13 Supp. 3d 486, 530 (S.D.N.Y. 2018); *South v. Baker*, 62 A.3d 1,18 (Del. Ch. 2012) (rejecting
14 argument that three isolated incidents at large corporation were “red flags”).

15 **Third**, despite elsewhere criticizing Ernst & Young for “consistently giv[ing] Facebook’s
16 internal controls a clean bill of health,” Compl. ¶¶ 30, 161, Plaintiff alleges that a 2019 Ernst &
17 Young audit “revealed deficiencies in Facebook’s processes and internal controls,” *id.* ¶ 77.
18 Plaintiff devotes just a single paragraph to that “audit,” but admits that Ernst & Young’s review
19 focused on “how Facebook measures and reports data about video advertisements” and had
20 nothing to do with the allegations of inadequate diversity driving her claims. *Id.*

21 **Fourth**, Plaintiff points to the HUD charge and the ACLU’s lawsuit against third parties
22 in August and September 2018, respectively, concerning allegedly discriminatory housing and
23 “help-wanted” ads on the Facebook platform, and vaguely references “five discrimination
24 lawsuits” settled in March 2019. Compl. ¶¶ 65-67, 76. But those prior proceedings cannot
25 represent a *failure* to act; indeed, Plaintiff admits that Facebook made adjustments to significantly
26 limit the targeting options available to advertisers. *Id.* ¶ 66; *In re Facebook*, 367 F. Supp. 3d at
27 1126. And again, Plaintiff has not explained why the Board should have anticipated the June 2020
28 “boycott” or otherwise taken (or avoided) particular actions in light of these past lawsuits,

1 particularly given that Facebook's policies have always prohibited discrimination. *In re Facebook*,
 2 367 F. Supp. 3d at 1125.

3 ***Finally***, even if Plaintiff had identified a "red flag," she does not allege any bad faith
 4 conduct by any particular director resulting in harm to Facebook. Plaintiff alleges that demand
 5 should be excused because the Compensation Committee's oversight failure allowed the Company
 6 to overpay executives based on discriminatory policies and conduct, *id.* ¶ 197, the Audit & Risk
 7 Oversight Committee's oversight failure caused the Company to rehire Ernst & Young as its
 8 auditor, *id.* ¶¶ 155-62, and Individual Defendants' oversight failure led Facebook to make
 9 misstatements in the 2019 and 2020 Proxies, *id.* ¶¶ 190, 196. But the Complaint nowhere specifies
 10 "what the Individual Defendants did to 'encourage' these unlawful [] practices, or why it must be
 11 that the Individual Defendants knew they were engaging in an unlawful scheme." *In re Facebook*,
 12 367 F. Supp. 3d at 1127. And Plaintiff does not allege "any particularized facts demonstrating
 13 how each Individual Defendant was involved in, prepared, or even knew about" any purported
 14 misstatements or omissions in the 2019 and 2020 Proxies. *Id.* In any event, as discussed in Section
 15 III.C below, Plaintiff's own allegations confirm the *truth*, not the falsity, of the proxy statements,
 16 which do not support a federal securities claim.

17 **2. Plaintiff Fails To Establish That Any Member—Let Alone A**
 18 **Majority—Of The Board Lacks Independence**

19 Plaintiff also fails to allege with particularity that the Facebook Board is "controlled" by
 20 Mr. Zuckerberg and thus lacks independence. Compl. ¶ 204.⁶ Judge Gilliam once again dismissed
 21 precisely *this claim* brought by *this Plaintiff* just last year, holding that the "mere fact that
 22 Zuckerberg is a controlling shareholder is not enough to establish his lack of independence" and
 23 "the fact that Zuckerberg is a controlling shareholder does not automatically mean that the other
 24 Individual Defendants are incapable of exercising judgment." *In re Facebook*, 367 F. Supp. 3d at
 25 1128. Plaintiff has not alleged anything different in this case and, given the presence of five new
 26

27 ⁶ The "independence" of the remaining directors matters only if Plaintiff first demonstrates that
 28 Mr. Zuckerberg is "interested" in this lawsuit because he faces a substantial likelihood of personal
 liability for the claims alleged. *See Desimone*, 924 A2d at 928; *Beam*, 845 A.2d at 1052. Because
 Plaintiff has not alleged particularized facts sufficient to satisfy that threshold requirement, *see
 supra* Section III.A.1, her assertion that the Demand Board lacks independence is irrelevant.

1 directors since her prior failed lawsuit for whom Plaintiff does not even attempt to allege a lack of
 2 independence, her present pleading fails too.

3 Plaintiff has not even attempted to allege that *a majority* of the Demand Board is not
 4 independent in any way. She pleads individual allegations concerning a purported lack of
 5 independence as to just two current Board members (besides Mr. Zuckerberg)—Messrs.
 6 Andreessen and Thiel. Compl. ¶ 214. But Plaintiff must allege that *five* members (*i.e.*, a majority)
 7 of the Demand Board “in place at the time of the complaint” were not independent in order to
 8 excuse her demand obligation. *In re MIPS Techs., Inc. Deriv. Litig.*, 542 F. Supp. 2d 968, 975
 9 (N.D. Cal. 2008). On that basis alone, Plaintiff’s independence theory of demand futility fails.

10 In any event, none of Plaintiff’s allegations shows that *any* Facebook director was beholden
 11 to Mr. Zuckerberg when the Complaint was filed. Based on their alleged actions in relation to
 12 entities in which they have a separate interest, Plaintiff suggests that Messrs. Andreessen and Thiel
 13 have “demonstrated personal bias in favor of keeping founders in control of the companies they
 14 created.” Compl. ¶ 214. First, Judge Gilliam has already rejected Plaintiff’s claim that Messrs.
 15 Andreessen and Thiel were not independent for purposes of demand futility. *See In re Facebook*,
 16 367 F. Supp. 3d at 1115-16. Second, Plaintiff’s vague allegations regarding personal bias of
 17 keeping founders in control of companies is irrelevant to Messrs. Andreessen’s and Thiel’s
 18 independence as it pertains to Facebook and Mr. Zuckerberg specifically. Plaintiff also alleges
 19 that Mr. Zuckerberg and Mr. Andreessen had previous business relationships, and that Mr. Thiel’s
 20 venture capital fund gets “good deal flow” from Mr. Thiel’s role on the Board. *Id.* ¶¶ 216-221.
 21 But such conclusory allegations about “past connections,” “close relationships,” “business
 22 ventures,” and “well-established connections” are insufficient to refute the presumption of
 23 independence. *In re Facebook*, 367 F. Supp. 3d at 1128-29.

24 Finally, Plaintiff makes irrelevant and unsubstantiated allegations about relationships
 25 between Mr. Zuckerberg and two *former* directors—asserting that Mr. Zuckerberg “forced out”
 26 Mr. Chenault and Jeffrey Zients because they did not agree with him. Compl. ¶¶ 209-213. But
 27 alleged disagreements between Mr. Zuckerberg and two former directors say nothing about the
 28 independence of the *current* Board members who would have considered a pre-suit demand here.

1 3. **Plaintiff Fails To Establish That Any Challenged Board Decision Was**
 2 **Not A Reasonable Exercise Of Business Judgment**

3 Plaintiff also alleges in cursory fashion that demand is excused because Individual
 4 Defendants' conduct did not amount to "a legitimate exercise of business judgment." Compl. ¶¶
 5 188-91. This attempt to invoke the "*Aronson* standard" for demand futility fails too. *Aronson v.*
 6 *Lewis*, 473 A.2d 805, 814 (Del. 1984), *overruled in part on other grounds*, *Brehm*, 746 A.3d 244.
 7 *Aronson* applies to a shareholder's challenge to a specific board decision and allows a plaintiff to
 8 show *either* that the Demand Board is interested and not independent *or* that a challenged decision
 9 was not an exercise of reasonable business judgment. But as its own terms suggest, Plaintiff must
 10 identify a *specific* Board decision in order to invoke the *Aronson* standard's business judgment
 11 prong. Plaintiff fails to do that and, not surprisingly then, her vague allegations fail to show any
 12 board transaction was not a valid exercise of business judgment.

13 **B. The Complaint Cannot Be Litigated In This Forum**

14 Plaintiff's Complaint must be dismissed for the independent reason that it was filed in the
 15 wrong court. Facebook's Certificate of Incorporation contains a forum-selection clause
 16 designating the Delaware Court of Chancery as the exclusive forum for any derivative action
 17 purporting to assert claims on the Company's behalf, as well as any action alleging that the
 18 Company's directors breached their fiduciary duties. The "appropriate way to enforce [the] forum-
 19 selection clause . . . is through the doctrine of *forum non conveniens*." *Atl. Marine Const. Co. v.*
 20 *U.S. Dist. Court W.D. Tex.*, 571 U.S. 49, 60 (2013). The analysis proceeds in two steps: the Court
 21 must determine (1) whether the lawsuit falls within the scope of the forum-selection clause, and if
 22 it does, (2) whether the clause is valid and enforceable. *See Yei A. Sun v. Advanced China*
 23 *Healthcare, Inc.*, 901 F.3d 1081, 1086-87 (9th Cir. 2018) (citing *Atl. Marine*, 571 U.S. 49).

24 Plaintiff's lawsuit falls within the scope of the forum-selection clause in two separate
 25 respects—it is a derivative action and it asserts a claim for breach of fiduciary duty against the
 26 Company's directors. The clause is also valid and enforceable—and, having already mounted an
 27 unsuccessful challenge to the same provision in her prior derivative lawsuit against Facebook,
 28 Plaintiff is estopped from arguing otherwise. In any event, Judge Gilliam's ruling in her first suit

1 was correct and its reasoning applies with equal force here. The plain language of the forum-
 2 selection clause precludes her from proceeding with *any* derivative claim outside the Delaware
 3 Chancery Court, and even though that court lacks jurisdiction to hear her Exchange Act claim, it
 4 can provide ample remedies for the alleged misconduct. No more is required. The Court should
 5 enforce the forum-selection clause and dismiss the Complaint on *forum non conveniens* grounds.

6 **1. Facebook's Forum-Selection Clause Designates The Delaware Court
 7 Of Chancery As The Exclusive Forum For This Lawsuit**

8 Plaintiff's derivative action falls squarely within Facebook's forum-selection clause.
 9 Courts "apply federal contract law to interpret the scope of a forum-selection clause," including
 10 "'general principles for interpreting contracts.'" *Sun*, 901 F.3d at 1086 (citation omitted). Here,
 11 the plain language of the clause is unambiguous and dispositive:

12 Unless the corporation consents in writing to the selection of an
 13 alternative forum, the Court of Chancery of the State of Delaware
 14 *shall*, to the fullest extent permitted by law, be the *sole and exclusive*
 15 *forum* for (1) *any derivative action* or proceeding brought on behalf
 16 of the corporation, (2) *any action asserting a claim of breach of a fiduciary duty* owed by, or other wrongdoing by, any director, officer, employee or agent of the corporation to the corporation or the corporation's stockholders, . . . in each such case subject to said Court of Chancery having personal jurisdiction over the indispensable parties named as defendants therein. Any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the corporation shall be deemed to have notice of and consented to the provisions of this ARTICLE IX.

19 Ex. F, Art. IX (emphases added).⁷

20 The forum-selection clause encompasses Plaintiff's lawsuit for two independent reasons.
 21 First, it is a "derivative action"—"Plaintiff Natalie Ocegueda . . . brings this *shareholder derivative action on behalf of Facebook* and against certain present and former directors and officers of Facebook, Inc." Compl. at 2 (emphasis added); *see also id.* ¶ 30. Facebook's forum-selection broadly clause covers "*any derivative action or proceeding brought on behalf of the corporation.*" Ex. F, Art. IX (emphasis added). Second, Plaintiff brings claims against current and former Facebook directors and officers for allegedly breaching their fiduciary duties. Compl. ¶¶ 169-71,

27 ⁷ "[C]ourts routinely take judicial notice of certificates of incorporation when ruling on motions to dismiss in derivative actions." *In re Yahoo! Inc. S'holder Deriv. Litig.*, 153 F. Supp. 3d 1107, 1117 (N.D. Cal. 2015) (collecting cases).

1 222-30. Facebook's provision separately covers "any action asserting a claim of breach of a
 2 fiduciary duty owed by, or other wrongdoing by, any director [or] officer." Ex. F, Art. IX.

3 **2. The Forum-Selection Clause Is Valid And Enforceable**

4 Facebook's forum-selection clause is valid and enforceable, and Plaintiff is barred from
 5 arguing to the contrary. Plaintiff unsuccessfully challenged *the enforceability of the same forum-*
 6 *selection clause* in her prior suit, *see In re Facebook*, 367 F. Supp. 3d at 1115, 1119, and Judge
 7 Gilliam's rejection of her objections precludes her from relitigating the same arguments here.

8 **First**, the clause is facially valid under Delaware law. Just months ago, the Delaware
 9 Supreme Court confirmed that forum-selection clauses governing shareholder claims are valid and
 10 enforceable under Delaware's General Corporation Law ("DGCL"). *See Salzberg v.*
 11 *Sciabacucchi*, 227 A.3d 102 (Del. 2020). In *Salzberg*, the Court held that corporate charters may
 12 include a provision governing the forum in which shareholders may bring claims involving "intra-
 13 corporate litigation," regardless whether the claims are based on state or federal law. *Id.* at 114
 14 (citing DGCL § 102(b)(1)). *Salzberg* explained that federal claims alleging misleading statements
 15 to shareholders are "intra-corporate affairs" claims because they involve "an important aspect of a
 16 corporation's management of its business and affairs and of its relationship with its stockholders."
 17 *Id.* And a provision "that seeks to regulate the forum in which such 'intra-corporate' litigation can
 18 occur is a provision that addresses the 'management of the business' and the 'conduct of the affairs
 19 of the corporation,' and is, thus, facially valid." *Id.* (quoting DGCL § 102(b)(1)).

20 *Salzberg* is dispositive on the facial validity of Facebook's forum-selection clause. Here,
 21 as in *Salzberg*, the forum-selection clause is in the Company's Certificate of Incorporation. And
 22 here, as in *Salzberg*, the clause designates an exclusive forum for litigating "intra-corporate
 23 affairs," such as a shareholder derivative action. That ends the analysis as to facial validity.

24 **Second**, Facebook's forum-selection clause is also enforceable here—and Plaintiff is
 25 estopped from challenging its enforceability. As an initial matter, the party seeking to avoid a
 26 forum selection clause bears a 'heavy burden' to establish a ground upon which [the court] will
 27 conclude the clause is unenforceable." *Doe I v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009)
 28 (citation omitted); *see also Atl. Marine*, 571 U.S. at 63 (holding that a facially valid forum selection

1 clause should be “given controlling weight in all but the most exceptional cases”). Plaintiff has
 2 not even attempted to allege facts that would make this one of those exceptional cases. *Doe I*, 552
 3 F.3d at 1083. The Complaint contains no allegations that the forum-selection clause was
 4 incorporated as a result of “fraud, undue influence, or overweening bargaining power,” that the
 5 selected Delaware forum is “so gravely difficult” that Plaintiff will be “deprived of [her] day in
 6 court,” or that enforcement of the clause would contravene strong California public policy.
 7 *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) (citation omitted).

8 Further, in Plaintiff’s first derivative suit, Judge Gilliam squarely *rejected* her arguments
 9 that the forum-selection clause was unenforceable. *See In re Facebook*, 367 F. Supp. 3d at 1120-
 10 22. Having vigorously contested Facebook’s forum-selection clause in a prior proceeding, the
 11 *same* Plaintiff cannot relitigate the *same* provision against the *same* Defendants yet again.
 12 *Offshore Sportswear, Inc. v. Vuarnet Int’l, B.V.*, 114 F.3d 848, 849 (9th Cir. 1997) (confirming
 13 collateral estoppel applies to dismissals based on a forum-selection clause). Collateral estoppel
 14 operates to “prevent repetitious litigation of what is essentially the same dispute.” *B&B Hardware,*
 15 *Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 157 (2015). Judge Gilliam was right to reject Plaintiff’s
 16 challenge to the forum-selection clause before, and this Court should reach the same result.

17 3. The Forum-Selection Clause Applies To The Federal Claim

18 By its plain terms, Facebook’s forum-selection clause applies with equal force to *both*
 19 Plaintiff’s state derivative claims *and* federal derivative claim under the Exchange Act. The clause
 20 unequivocally states that Delaware’s Court of Chancery “shall” be the exclusive forum for “*any*
 21 derivative action.” Ex. F, Art. IX (emphasis added). That language is mandatory, exclusive, and
 22 encompasses *all* derivative claims—whether arising under state or federal law.⁸

23

24

25 ⁸ In Plaintiff’s prior derivative suit, the court dismissed her state-law claims on *forum non*
 26 *conveniens* grounds, but did not address whether the forum-selection clause also required dismissal
 27 of her federal derivative claims under the Exchange Act, *see In re Facebook*, 367 F. Supp. 3d at
 28 1120, instead dismissing the federal claim for failure to plead demand futility, *id.* at 1131.
 Facebook did not argue in its opening submission in support of dismissal that the forum-selection
 clause applied equally to the federal derivative claims. Subsequent to that submission, the Ninth
 Circuit issued its *Sun* decision, which, along with the other case law cited above, makes clear that
 the clause applies with equal force to both state and federal derivative claims.

Under well-established precedent, the fact that the Delaware Court of Chancery lacks jurisdiction over Plaintiff's Exchange Act claim makes no difference to the forum-selection clause analysis. Courts must enforce a "forum-selection clause unless the contractually selected forum affords the plaintiffs *no remedies whatsoever.*" *Sun*, 901 F.3d at 1089 (emphasis added). In *Sun*, the Ninth Circuit enforced a provision that designated California as the exclusive forum, despite plaintiffs' argument that doing so would prevent them from bringing their claims under the Washington State Securities Act. *Id.* at 1084. The Ninth Circuit rejected plaintiffs' argument because they "could still pursue relief for fraud, breach of fiduciary duty, or negligent misrepresentation" under California law. *Id.* at 1089-90 (citing *Richards v. Lloyd's of London*, 135 F.3d 1289, 1296 (9th Cir. 1998)).

The Ninth Circuit has reached the same conclusion when the selected forum was a foreign country. *See Richards*, 135 F.3d at 1296. In *Richards*, the designated forum (England) precluded *all* of the specific state and federal causes of action asserted. Nonetheless, the court enforced the defendant company's forum-selection clause by its terms. Similar to its rationale in *Sun*, the Ninth Circuit recognized that the plaintiffs would not be left without *any* claim for redressing the wrong alleged because English law "provides a variety of protections for fraud and misrepresentations in securities transactions." *Id.* (citations omitted); *Lewis v. Liberty Mut. Ins. Co.*, 953 F.3d 1160, 1168-70 (9th Cir. 2020) (applying *Sun* to enforce designation of Australia as exclusive forum, despite plaintiffs' arguments about different "substantive law between California and Australia").⁹

Another district court recently reached the exact same conclusion under conditions virtually identical to this case. In *Seafarers Pension Plan on behalf of Boeing Co. v. Bradway*, the

⁹ Numerous other courts of appeals have held the same. *See, e.g., Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993); *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285 (11th Cir. 1998). As have many district courts. *See, e.g., Spenta Enterprises v. Coleman*, 574 F. Supp. 2d 851, 857 (N.D. Ill. 2008) (enforcing forum-selection provision "even when doing so meant that parties could not bring their federal securities claims"); *Solid Q Hldg. v. Arenal Energy*, 2017 WL 935891, *2 (D. Utah Mar. 8, 2017) (enforcing clause selecting state forum even though complaint asserted claim subject to exclusive federal jurisdiction); *Vernon v. Stabach*, 2014 WL 1806861, *6 (S.D. Fla. May 7, 2014) (same); *see also E. & J. Gallo Winery v. Andina Licores S.A.*, 440 F. Supp. 2d 1115 (E.D. Cal. 2006) ("[T]hat a forum or choice of law specified by contract affords remedies that are different or less favorable to laws of forum preferred by plaintiff is not alone valid basis to deny enforcement of forum selection and choice of law provisions.").

1 plaintiff sued Boeing and certain of its directors, asserting a federal derivative claim under Section
 2 14(a) of the Exchange Act based on alleged misrepresentations in the company’s proxy statements.
 3 2020 WL 3246326 (N.D. Ill. June 8, 2020). Like Facebook’s Certificate of Incorporation,
 4 Boeing’s bylaws designated the Delaware Chancery Court as the exclusive forum for derivative
 5 actions brought on behalf of the corporation. *Id.* at *1. The plaintiff argued—and the court
 6 acknowledged—that enforcing Boeing’s bylaw would effectively leave the plaintiff without any
 7 forum in which to pursue its Exchange Act claim. But the court nonetheless enforced Boeing’s
 8 forum-selection clause and dismissed the plaintiff’s derivative claims in their entirety. Of
 9 particular relevance, the court observed that “Delaware law provides for a cause of action that is
 10 ‘substantially similar’ to a federal derivative cause of action against corporate directors for failing
 11 to do exactly what Plaintiff contend[ed] that the Defendant directors failed to do,” and thus offered
 12 an adequate remedy based on “precisely” the same allegations. *Id.* at *2. The “weight of authority”
 13 therefore supported dismissal on *forum non conveniens* grounds. *Id.* at *4.

14 The same analysis applies here. Facebook’s forum-selection clause covers “any derivative
 15 action,” Plaintiff’s Exchange Act claim is a “derivative action,” and it makes no difference that the
 16 Delaware Chancery Court cannot hear that particular claim because it affords Plaintiff ample
 17 alternatives to seek identical relief for the same alleged conduct.

18 C. Plaintiff Fails To State A Claim For Violation Of Section 14(a)

19 Plaintiff’s derivative claim under Section 14(a) of the Exchange Act also fails on the merits.
 20 To survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain sufficient factual
 21 matter, accepted as true, to state a claim for relief that is plausible on its face.” *Ashcroft v. Iqbal*,
 22 556 U.S. 662, 678 (2009). A court need not accept as true allegations that are “merely conclusory,
 23 unwarranted deductions of fact, or unreasonable inferences.” *Daniels-Hall v. Nat’l Educ. Ass’n*,
 24 629 F.3d 992, 998 (9th Cir. 2010).

25 Section 14(a) requires a plaintiff to allege that a proxy statement contained a material
 26 misrepresentation or omitted a material fact necessary to make the affirmative statements in the
 27 proxy not false or misleading. 15 U.S.C. § 78n(a); 17 C.F.R. § 240.14a-9(a); *Desaigoudar*, 223
 28 F.3d at 1022. The PSLRA requires the plaintiff to specify “(1) each statement alleged to have been

1 misleading; (2) the reason or reasons why the statement is misleading; and (3) all facts on which
 2 that belief is formed.” *Desaigoudar*, 223 F.3d at 1023. And where, as here, a plaintiff’s federal
 3 securities claim sounds in fraud, the heightened pleading standards of Rule 9(b) also apply. *Id.* at
 4 1022-23.¹⁰ The complaint must include specific facts giving rise to a “strong inference that the
 5 defendant[s] acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2)(A); *see In re*
 6 *McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1267 (N.D. Cal. 2000). Finally, the
 7 plaintiff must plead particularized facts demonstrating that the portion(s) of the proxy statement
 8 challenged as false or misleading directly authorized and caused the corporate action that led to
 9 the harm alleged. *In re Paypal*, 2018 WL 466527, at *4; *Or. Pub. Emps. Ret. Fund v. Apollo Grp., Inc.*, 774 F.3d 598, 605 (9th Cir. 2014).

11 Plaintiff alleges that Individual Defendants violated Section 14(a) by causing Facebook to
 12 make materially false or misleading statements in the 2019 and 2020 Proxies. Compl. ¶¶ 94-144.
 13 Plaintiff challenges statements related to (1) Facebook’s “commitment to diversity” in its
 14 workforce, *id.* ¶¶ 98, 103, 111, 131-32; (2) Facebook’s commitment to diversity at the Board level,
 15 *id.* ¶¶ 100-01, 105-06, 108, 129-30; and (3) an advisory vote on Facebook’s executive
 16 compensation, *id.* ¶¶ 112-14, 116-18, 134-36, 141.¹¹ Plaintiff alleges these statements were false
 17 because Facebook “has not made substantial efforts to diversify its Board,” Facebook’s diversity
 18 policies “were not being complied with,” and Individual Defendants “failed to appropriately
 19 address the Company’s lack of diversity.” *Id.* ¶ 121. According to Plaintiff, the Proxies misled
 20 investors into voting for proposals electing nominated directors and approving—in an advisory
 21 manner—Facebook’s executive compensation. *E.g., id.* ¶ 119. Plaintiff also claims these alleged
 22 misstatements caused advertisers to “boycott” Facebook in June 2020. *Id.* ¶ 181.

23

24 ¹⁰ Plaintiff alleges the Individual Defendants *knew* the Proxies were false, but intentionally caused
 25 them to issue. *See, e.g.*, Compl. ¶¶ 26, 142-43, 191. Because Plaintiff alleges a single course of
 26 conduct “grounded in alleged fraudulent conduct,” the Complaint must meet the more demanding
 27 pleading standards of Rule 9(b) and the PSLRA “even if [plaintiff] disclaim[s] reliance on a fraud
 theory.” *In re Columbia Pipeline, Inc.*, 405 F. Supp. 3d 494, 506 (S.D.N.Y. 2019); *see also In re*
Rigel Pharms., Inc. Sec. Litig., 697 F.3d 869, 885-86 (9th Cir. 2012); *Huang v. Avalanche*
Biotechnologies, Inc., 2016 WL 6524401, at *8-9 (N.D. Cal. Nov. 3, 2016).

28 ¹¹ Plaintiff also purports to challenge the statement in the Proxies that Facebook believed it need
 not have an independent, non-employee Board Chairman. Compl. ¶¶ 128, 133. But Plaintiff never
 explains how that statement was false or misleading. *See Desaigoudar*, 223 F.3d at 1023.

1 Plaintiff's allegations are deficient. Her claim rests on conclusory accusations about the
 2 Board's supposed shortcomings, but the Complaint is devoid of any particularized facts supporting
 3 those accusations or demonstrating that any challenged statement was false or misleading—or
 4 even material. Moreover, Plaintiff comes nowhere close to alleging facts establishing that any
 5 Individual Defendant acted negligently (let alone with scienter), or that the challenged statements
 6 proximately caused the alleged harm.

7 **1. Plaintiff Fails To Allege A Material Misstatement Or Omission**

8 Plaintiff's claim fails at the first element. To allege a false or misleading statement,
 9 Plaintiff must plead, with particularity, each alleged misstatement and the reason(s) why the
 10 statement was false or misleading. *Golub v. Gigamon Inc.*, 2019 WL 4168948, at *5 (N.D. Cal.
 11 Sept. 3, 2019). Vague allegations followed by generalized explanations of how the statements
 12 were false or misleading are insufficient. *In re ITT Educ. Servs., Inc. Sec. & S'holder Deriv. Litig.*,
 13 859 F. Supp. 2d 572, 578 (S.D.N.Y. 2012). And a statement is material only if “there is a
 14 substantial likelihood that a reasonable shareholder would consider it important in deciding how
 15 to vote.” *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

16 ***Facebook's Commitment to Diversity in its Workforce.*** Plaintiff challenges statements
 17 about workforce diversity and accuses the Company of “discriminatory hiring practices.” But
 18 Plaintiff alleges no facts showing *how* Facebook’s hiring practices were discriminatory or *how* any
 19 particular challenged statement was false or misleading. *See Desaigoudar*, 223 F.3d at 1023; *In*
 20 *re Textainer P’ship Sec. Litig.*, 2005 WL 3801596, at *6 (N.D. Cal. Dec. 12, 2005).

21 The 2019 and 2020 Proxies, for example, expressed Facebook’s commitment “to building
 22 a workforce that is as diverse as the communities we serve,” and described “[d]iversity of ideas”
 23 as “core to our business.” Ex. C at 47, 69; Ex. B at 81; Compl. ¶¶ 103, 111. The Company
 24 disclosed the trainings it offers its personnel “to help employees better understand diverse
 25 perspectives,” including “comprehensive managing bias training . . . to understand the issues that
 26 affect underrepresented communities and actively solicit input from people who may feel
 27 excluded.” Compl. ¶ 111; *see also id.* ¶ 52 (describing diversity and inclusion programs). And
 28

1 the 2020 Proxy discussed Facebook’s progress in “increasing the numbers of Black and Hispanic
 2 people in non-technical roles in the U.S.” *Id.* ¶ 131.

3 Plaintiff alleges these statements were false because Facebook’s executive team does not
 4 presently include any Black employees. *Id.* ¶ 11. That allegation is simply wrong—Facebook’s
 5 Head of New Product Experimentation is Black, as is its Chief Diversity Officer. Exs. H, J. The
 6 composition of Facebook’s senior management only underscores the *truth* of Facebook’s
 7 statements about diversity at least five senior executives during the relevant period were non-
 8 white, Exs. H, J, K, and two of the six executives Plaintiff identifies are women, Compl. ¶ 11.

9 Plaintiff’s own allegations (and the documents she relies on) acknowledge Facebook’s
 10 efforts to increase the diversity of its workforce and its related progress—and thus reinforce the
 11 truth of the statements she challenges. The Proxies describe numerous programs Facebook has
 12 implemented—including the Diverse Slate Approach (discussed *supra*), Facebook University (a
 13 training program for college freshmen from underrepresented groups with an interest in STEM), a
 14 “Managing Unconscious Bias” training (aimed at reducing the effects of workplace bias and
 15 increasing understanding of diverse perspectives), a “Managing Inclusion” training (aimed at
 16 teaching managers to understand the issues that affect underrepresented communities and actively
 17 solicit input from people who may feel excluded), a “Be The Ally training (giving Facebook
 18 employees tools to identify and support someone who may be experiencing bias), and annual
 19 events such as the Women’s Community Summit, Black Community Summit, Latin Community
 20 Summit, and Pride Community Summit (which help foster community and professional
 21 development). *See, e.g.*, Ex. C at 47-48; Ex. B at 81-82; Compl. ¶¶ 103, 111. Those efforts, as
 22 the Complaint recognizes, have met with increasing success. Facebook disclosed in its 2020 Proxy
 23 that it had increased the number of female employees globally at Facebook from 31% in 2014 to
 24 37% in 2019, and further that it had increased “the number of Black women at Facebook by a
 25 factor of 25 and the number of Black men by a factor of 10” since 2014—facts that Plaintiff does
 26 not challenge. Ex. B at 52, 81; Compl. ¶ 131; *see also* Ex. C at 47 (“We have seen steady increases
 27 in hiring rates for underrepresented people since we started” the “Diverse Slate Approach”).

28

1 ***Facebook's Board Nomination Process.*** Plaintiff also challenges disclosures in the
 2 Proxies related to Facebook's process for nominating individuals to its Board. *See, e.g.*, Compl.
 3 ¶¶ 100-01, 108, 129-30. Specifically, Plaintiff contests Facebook's statement that "when
 4 evaluating candidates for nomination as new directors, *it is the policy of our board of directors to*
 5 *consider candidates with diverse backgrounds . . . and to insure that the initial list of candidates*
 6 *from which new director nominees are chosen by the board includes candidates with a diversity*
 7 *of race, ethnicity, and gender.*" *Id.* ¶¶ 100, 129. Plaintiff similarly asserts it was false or
 8 misleading for Facebook to represent that its "board of directors also periodically reviews its
 9 composition to ensure that it appropriately reflects the knowledge, experience, skills, diversity,
 10 and other characteristics required to fulfill its duties," and that the Board "believes that its
 11 composition appropriately reflects [those characteristics] required to fulfill its duties." *Id.* ¶ 101.
 12 According to Plaintiff, these statements were false and misleading because "regardless of whether
 13 the Company's Compensation and Governance Committee . . . ever made any efforts to recruit
 14 any Black individuals and other minorities to the Board, only one Black individual currently serves
 15 on the Board." *Id.* ¶ 102. Plaintiff is wrong. Facebook has two Black directors and has had two
 16 since the 2019 Proxy, and four out of nine directors are women. Ex. G. Regardless, Plaintiff's
 17 belief that the Company should have more than "one Black individual" on its Board does not
 18 demonstrate the falsity of the Company's statements about diversity.

19 Plaintiff's theory of falsity ultimately hinges on a bald assertion that "the Board has never
 20 in good faith actively sought minority candidates." *Id.* But such a "conclusory allegation of
 21 falsity" is insufficient to sustain a securities claim. *Sjunde AP-Fonden v. Gen. Elec. Co.*, 417 F.
 22 Supp. 3d 379, 413 (S.D.N.Y. 2019). Plaintiff cites nothing to suggest the Board does not, in fact,
 23 "consider candidates with diverse backgrounds"; indeed, that the Board includes individuals of
 24 varying race, sexual orientation, and gender confirms the truth of Facebook's statements.

25 ***Facebook's Executive Compensation.*** Finally, Plaintiff challenges statements related to
 26 Facebook's executive compensation—including disclosures about measuring executive
 27 performance for bonuses, compensation charts, and statements related to "a non-binding advisory
 28 [shareholder] vote on the compensation program for [the Company's] named executive officers."

1 Compl. ¶¶ 113-14, 116-18, 134-36, 141. Plaintiff alleges without any support that most or all of
 2 “[t]he information in the [Proxies] about executive compensation was false and misleading”
 3 because it omitted that executives’ performance goals were based “in large part” on purportedly
 4 “unlawful and discriminatory advertising, hiring, and pay practices.” *Id.* ¶ 118; *see also id.* ¶ 140.

5 As an initial matter, Facebook expressly disclosed the Company-wide priorities used, in
 6 part, to determine bonuses for *all* employees, including to “grow our user base across all our
 7 products; increase sharing, engagement, and meaningful interactions; continue to achieve revenue
 8 growth and significant savings from efficiency; improve product quality; improve securities for
 9 our community; improve our brand; and make progress toward our long-term investments.” *Id.* ¶
 10 116. The Company reported each year the exact amount of each officer’s compensation. Facebook
 11 also reported that an independent consultant conducted an annual review to confirm each year that
 12 its compensation plans were “not reasonably likely to have a material adverse effect on” the
 13 Company. *E.g.*, Ex. B at 25. Plaintiff does not dispute the accuracy of those disclosures. *Id.*
 14 ¶ 116. Instead, she offers a fuzzy assertion that unspecified aspects of Facebook’s compensation
 15 plans “gave Defendants a strong incentive to continue concealing the true nature of the Company’s
 16 discriminatory advertising practices.” *Id.* ¶ 118. That theory makes no sense. To start, Ms.
 17 Sandberg is the only Individual Defendant alleged to have participated in the executive
 18 compensation bonus program, *id.* ¶ 116, and Plaintiff fails to explain how any other Individual
 19 Defendant would have been incentivized to engage in unlawful behavior by virtue of a program in
 20 which they did not participate, *see Sjunde*, 417 F. Supp. 3d at 413. But more fundamentally, there
 21 is simply no factual basis at all for Plaintiff’s underlying assertion—save generalized references
 22 to a small number of prior lawsuits that Facebook has since resolved, Compl. ¶ 76, Plaintiff has
 23 not cited a single advertisement that she contends was unlawful or discriminatory, nor attempted
 24 to identify the proportionate impact of any such advertisements on Facebook’s overall revenue
 25 (and the corresponding effect, if any, on executive compensation). And her passing references to
 26 purportedly illicit hiring practices are equally unsupported. Because Plaintiff “has not identified,
 27 with the particularity required by the PSLRA, why” Defendants’ alleged “omission . . . caused the
 28

1 . . . identified statements to be materially misleading,” her Section 14(a) claim as to the executive
 2 compensation statements fails. *In re Textainer*, 2005 WL 3801596, at *6.

3 ***The Alleged Misstatements Or Omissions Are Immaterial.*** Plaintiff’s Section 14(a) claim
 4 fails for the independent reason that it relies on statements that are immaterial as a matter of law.

5 ***First,*** Plaintiff’s claim, at its core, is that Individual Defendants failed to disclose their
 6 allegedly deficient oversight of Facebook’s diversity and inclusion efforts—the same purported
 7 misconduct animating her primary fiduciary duty and related claims under state law. But the Ninth
 8 Circuit has unequivocally held that such alleged nondisclosure of a purported “breach of fiduciary
 9 duty . . . is *never* material for § 14(a) purposes.” *Gaines v. Haughton*, 645 F.2d 761, 776-77 (9th
 10 Cir. 1981), *overruled on other grounds*, *Matter of McLinn*, 739 F.2d 1395 (9th Cir. 1984). Alleged
 11 director misconduct “traditionally regulated by corporate law . . . is simply not material or
 12 otherwise within the ambit of federal securities laws” and “need not be disclosed in proxy
 13 solicitations for director elections.” *In re JPMorgan Chase Deriv. Litig.*, 2014 WL 5430487, at
 14 *18 (E.D. Cal. Oct. 24, 2014). Accordingly, courts have “consistently [] rejected” any “attempt to
 15 use [Section] 14(a) and Rule 14a-9 as an avenue for access to the federal courts in order to redress
 16 alleged mismanagement or breach of fiduciary duty.” *Witchko v. Schorsch*, 2016 WL 3887289, at
 17 *7 (S.D.N.Y. June 9, 2016). Here, Plaintiff’s Section 14(a) claim is “essentially [a] breach of
 18 fiduciary duty claim[] alleging mismanagement”—including a failure to adequately monitor
 19 Facebook’s diversity and anti-discrimination efforts—and therefore fails to state a securities
 20 violation. *Schwartzman v. McGavick*, 2007 WL 1174697, at *11 (W.D. Wash. Apr. 19, 2007).

21 ***Second,*** the scant information Plaintiff does rely on in an attempt to prove the purported
 22 falsity of Defendants’ challenged statements was *publicly available* to investors at or before the
 23 time of those statements. Plaintiff cites prior litigation, Mr. Zuckerberg’s congressional testimony,
 24 and 2018 and 2019 news articles to show that statements in Facebook’s subsequent Proxies were
 25 false or misleading. *See, e.g.*, Compl. ¶¶ 69-70 (citing public sources to suggest Facebook “has
 26 very few Blacks among its employees”). But any such public information would *necessarily* have
 27 been known to Facebook shareholders *before* the Proxies were issued, and therefore cannot form
 28 the basis of a material misstatement. *See Bettis v. Aixtron SE*, 2016 WL 7468194, at *12 (S.D.N.Y.

1 Dec. 20, 2016) (rejecting federal securities claim based on information previously “reported by
 2 news and media outlets” and thus already “in the public domain”). By the same token, events
 3 post-dating Facebook’s Proxies—particularly the Company’s response to a post by President
 4 Trump—cannot form the basis of a material misstatement or omission at the time the Proxies were
 5 issued. *See Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 693 (9th Cir. 2011).

6 **Third**, the challenged statements are largely actionable corporate optimism. For
 7 example, Plaintiff argues it was materially false or misleading for Facebook to state “We are
 8 committed to building a workforce that is as diverse as the communities we serve,” and “We
 9 believe retention, people development, and inclusion are just as crucial as recruiting.” Compl. ¶
 10 103. But such “vague statements of optimism” are neither falsifiable nor material. *Police Ret.*
 11 *Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1060 (9th Cir. 2014). Indeed, statements
 12 about a company’s commitment to “a diverse workforce” and “an inclusive and positive working
 13 environment” are “precisely the type of ‘puffery’ that [courts] have consistently held to be
 14 actionable.” *Lopez v. Ctpartners Exec. Search, Inc.*, 173 F. Supp. 3d 12, 19, 26-29 (S.D.N.Y.
 15 2016); *Nathanson v. Polycom, Inc.*, 87 F. Supp. 3d 966, 976-77 (N.D. Cal. 2015) (“commitment
 16 to” ethical practices was “inherently aspirational and hence immaterial”); *Retail Wholesale &*
 17 *Dept. Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 52 F. Supp. 3d 961, 965, 970 n.2
 18 (N.D. Cal. 2014) (“commitment to the highest standards of governance”).

19 ***Plaintiff Has Not Pled Facts Establishing The Falsity Of Any Opinion Statements.***
 20 Facebook’s subjective assertions about its workforce and Board structure trigger strict pleading
 21 requirements under *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575
 22 U.S. 175 (2015), which Plaintiff fails to meet. To allege an actionable opinion statement, Plaintiff
 23 must plead that Defendants “d[id] not honestly hold the stated belief and the belief is objectively
 24 incorrect.” *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d
 25 605, 615 (9th Cir. 2017). Plaintiff makes conclusory assertions to that effect, *see, e.g.*, Compl. ¶
 26 109, but Plaintiff has not even tried to allege *facts* showing, for example, that any Individual
 27 Defendant did not “believe retention, people development, and inclusion are just as crucial as
 28

recruiting” for Facebook. Compl. ¶¶ 52, 103. Plaintiff’s challenges to other expressions of subjective belief fail for the same reason—including:

- “We believe that having diverse suppliers helps us build better products for our global community, *id.* ¶ 52;
 - “Our board of directors believes that its composition appropriately reflects the knowledge, experience, skills, diversity, and other characteristics required to fulfill its duties,” *id.* ¶¶ 101;
 - “We believe that implementing the proposal [related to board nominee qualifications disclosures] is unnecessary because our current disclosures effectively describe our board membership criteria,” *id.* ¶ 106;
 - “We believe that our current board structure is effective in supporting strong board leadership,” *id.* ¶¶ 108, 128, 133;
 - “Our compensation & governance committee and our board of directors believe that these policies are effective in implementing our compensation philosophy and in achieving our goals,” *id.* ¶ 113;
 - “We believe [a 94:1] ratio is a reasonable estimate calculated in a manner consistent with Item 402(u) of Regulation S-K under the Exchange Act,” *id.* ¶ 134; and
 - “We believe that our compensation mix supports our objective of focusing on at-risk compensation having significant financial upside based on individual performance and our performance relative to company priorities, *id.* ¶ 135.

2. Plaintiff Fails To Allege That The Proxies Were An “Essential Link” To The Purportedly Loss-Generating Corporate Action

16 Plaintiff also fails to demonstrate that “the proxy solicitation itself . . . was an essential link
17 in the accomplishment of the transaction” that ultimately caused the harm alleged. *Mills v. Elec.*
18 *Auto-Lite Co.*, 396 U.S. 375 385 (1970). This “essential link requirement can only be established
19 when the proxy statement at issue *directly* authorizes the loss-generating corporate action.” *Kelley*
20 *v. Rambus, Inc.*, 2008 WL 5170598, at *7 (N.D. Cal. Dec. 9, 2008); *see also In re Paypal*, 2018
21 WL 466527, at *4. As a corollary, “damages [that] are not a result of the corporate action
22 authorized by the proxy statement . . . are not the type of damages sought to be remedied by section
23 14(a).” *Corwin v. Bresler*, 741 F.2d 410, 428 (D.C. Cir. 1984).

24 The harm alleged here is “extreme reputational damage to the Company” resulting in
25 Facebook “expend[ing] significant additional money” to defend against lawsuits like this one, lost
26 revenue stemming from the June 2020 advertiser boycott (which, as discussed, is not represented
27 in Facebook’s strong second-quarter revenues and stock price increase), and compensation
28 purportedly resulting from discriminatory practices. Compl. ¶¶ 180, 183. But none of those

1 purported harms was “authorized by” the 2019 or 2020 Proxies. Plaintiff cannot reasonably
 2 demonstrate, for example, that shareholder votes based on the Proxies somehow facilitated an
 3 advertiser boycott in June 2020. On the contrary, Plaintiff herself alleges that the boycott was
 4 prompted by Facebook’s decision not to remove a post by President Trump. *Id.* ¶¶ 16-17. The
 5 challenged statements have nothing to do with permitting (or curbing) hate speech by Facebook
 6 users. And Plaintiff does not—and cannot—allege facts suggesting the Proxies, or any resulting
 7 shareholder vote, “authorized” certain advertisers’ recent actions. *See Corwin*, 741 F.2d at 428.

8 Plaintiff’s additional allegations of harm—including litigation costs, executive
 9 compensation, and reelection of board members—fare no better. Plaintiff cannot manufacture a
 10 corporate harm simply by creating the need for Facebook to incur legal fees, and Plaintiff has not
 11 tied past settlement of lawsuits related to housing and job advertisements to the votes tendered in
 12 connection with the Proxies. And the compensation paid to Facebook’s executives—or any
 13 Individual Defendant, for that matter—was subject only to a non-binding *advisory vote* by
 14 shareholders. Ex. C at 3; Ex. B at 33. But “[a]dvisory votes do not authorize any corporate action”
 15 and therefore cannot form the basis of the “essential link” needed to state a Section 14(a) claim.
 16 *Hastey v. Welch*, 449 F. Supp. 3d 1053, 1064 (D. Kan. 2020); *see also Swanson v. Weil*, 2012 WL
 17 4442795, at *9 n.7 (D. Colo. Sept. 26, 2012) (holding plaintiff could not allege loss causation
 18 based on advisory executive compensation vote); *Witchko*, 2016 WL 3887289, at *7 (same).

19 Finally, Plaintiff’s allegation that the Proxies misled shareholders to “reelect the current
 20 Board,” Compl. ¶ 245, is “precisely the sort of claim that courts have repeatedly found insufficient
 21 to satisfy the transaction causation requirement” of Section 14(a), *Levitt v. Cathcart*, 980 F.2d 927,
 22 933 (3d Cir. 1992). “A claim that the reelection of the directors was an essential link to loss-
 23 generating corporate action because of the directors’ subsequent mismanagement cannot form the
 24 basis of liability under Section 14(a).” *In re Diamond Foods, Inc. Deriv. Litig.*, 2012 WL 1945814,
 25 at *7 (N.D. Cal. May 29, 2012); *see also In re Paypal*, 2018 WL 466527, at *4 (same).¹²

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¹² Plaintiff’s passing allegation that absent the misleading Proxies, shareholders would not have voted against having an independent board chairman, Compl. ¶ 244, fails for the same reasons—having an independent chairman has nothing to do with any alleged corporate harm.

1 **3. Plaintiff's Section 14(a) Claim Is Partially Time-Barred**

2 The limitations period for a Section 14(a) claim is the earlier of one year after discovery of
 3 the alleged violation or three years from the alleged violation's occurrence. *In re Verisign, Inc.*
 4 *Deriv. Litig.*, 531 F. Supp. 2d 1173, 1212 (N.D. Cal. 2007). A plaintiff need not know all of the
 5 facts underlying the complaint to have been on inquiry notice of a purported violation. Rather, the
 6 statute of limitations is triggered "when a prospective plaintiff receives notice of his or her claim"
 7 such that she becomes aware of warnings that "there were either misleading statements or
 8 significant omissions involved." *Lane v. Page*, 649 F. Supp. 2d 1256, 1298 (D.N.M. 2009). That
 9 restriction precludes Plaintiff's claim in part.

10 As discussed *supra*, Plaintiff asserts that portions of the 2019 Proxy were false or
 11 misleading based on occurrences in 2018 and 2019—including news articles, past lawsuits, and
 12 congressional testimony. These events largely preceded the issuance of the 2019 Proxy on April
 13 12, 2019. For example, Plaintiff points to Mr. Zuckerberg's congressional testimony in April
 14 2018, Compl. ¶¶ 57-59, news articles in July and November 2018, *id.* ¶¶ 64, 68-69, the August and
 15 September 2018 HUD charge and ACLU lawsuit against third parties, *id.* ¶ 65, and five lawsuits
 16 settled in March 2019, *id.* ¶ 76. To the extent Plaintiff now relies on such pre-existing information
 17 to suggest that statements in the 2019 Proxy were false or misleading when made, she necessarily
 18 would have been immediately on notice of those purported misrepresentations at the time of the
 19 2019 Proxy's public filing in April 2019. The time for Plaintiff to raise her Section 14(a) claim as
 20 to the 2019 Proxy therefore expired in April 2020—several months before she filed her complaint.
 21 *See Stricklin v. Ferland*, 1998 WL 966023, at *4 (E.D. Pa. Nov. 10, 1998) (finding Section 14(a)
 22 claim time-barred where, "[a]ccording to the complaint, the underlying facts which made the[] two
 23 proxies misleading were known to the plaintiff" more than a year before the complaint was filed).

24 **D. Plaintiff's Claims Are Unripe**

25 Because ripeness "pertain[s] to federal courts' subject matter jurisdiction," it is "properly
 26 raised in a Rule 12(b)(1) motion to dismiss." *Chandler v. State Farm Mut. Auto Ins. Co.*, 598 F.3d
 27 1115, 1122 (9th Cir. 2010). "In a facial attack, the challenger asserts that the allegations contained
 28 in a complaint are insufficient on their face to invoke federal jurisdiction." *Edison v. United States*,

1 822 F.3d 510, 517 (9th Cir. 2016). A court treats a facial subject-matter jurisdiction challenge in
 2 the same way as a Rule 12(b)(6) motion, *see Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir.
 3 2014), and “cannot construe the complaint so liberally as to extend [its] jurisdiction beyond its
 4 constitutional limits,” *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

5 Plaintiff’s claims are at least partially unripe. *S. Pac. Transp. Co. v. City of Los Angeles*,
 6 922 F.2d 498, 502 (9th Cir. 1990). “A claim is not ripe for adjudication if it rests upon ‘contingent
 7 future events that may not occur as anticipated, or indeed may not occur at all.’” *Texas*, 523 U.S.
 8 at 300 (citation omitted). Plaintiff seeks to recover on behalf of Facebook “costs incurred in
 9 defending against, and the potential settlement of, civil and governmental lawsuits brought against
 10 the Company related to the discriminatory practices,” “loss of advertising revenue,” and payment
 11 of executive compensation. Compl. ¶ 183. But “when a derivative claim is premised on the
 12 outcome of separate litigation, the company may seek indemnification for the costs and liability
 13 of that litigation from individual officers and board members only if the allegations of those
 14 individuals’ misconduct are proven true.” *In re BofI Holdings, Inc. S’holder Litig.*, 2018 WL
 15 2731954, at *9 (S.D. Cal. June 7, 2018). Plaintiff fails to allege any connection between her claims
 16 against Individual Defendants and the March 2019 settlement with housing groups. And because
 17 her claimed damages for costs incurred in this action and the pending HUD charge and ACLU suit
 18 against third parties “depend[] on the future outcome of litigation,” they are “by definition
 19 contingent” and, therefore, “unripe.” *Id.*; *In re Facebook, Inc. IPO Sec. & Deriv. Litig.*, 922 F.
 20 Supp. 2d 445, 474-75 (S.D.N.Y. 2013), aff’d sub nom. *In re Facebook, Inc., Initial Pub. Offering*
 21 *Deriv. Litig.*, 797 F.3d 148 (2d Cir. 2015). The same is true for alleged lost advertising revenue.
 22 Plaintiff has not alleged any such loss, and Facebook continues to see positive financial results.
 23 Ex. E at 27.

24 **IV. CONCLUSION**

25 For the foregoing reasons, the Court should dismiss this action for failure to make a pre-
 26 suit demand on the Facebook Board as required by FRCP 23.1, pursuant to the doctrine of *forum*
 27 *non conveniens*, for failure to state a claim under FRCP 12(b)(6) for violation of Section 14(a) of
 28 the Exchange Act, and/or because Plaintiff’s claims are unripe.

1 Dated: October 5, 2020

Respectfully submitted,

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